

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 24**

ESS SUPPORT SERVICES WORLDWIDE, A  
SUBSIDIARY OF COMPASS GROUP USA, INC.<sup>1</sup>

Employer

and

Case 24-RC-8471

UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL  
AND SERVICE WORKERS INTERNATIONAL UNION,  
AFL-CIO, CLC

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein the Act, a hearing was held on July 6, 2005, before a hearing officer of the National Labor Relations Board, herein the Board, to determine whether a question concerning representation exists, and if so, to determine an appropriate unit for collective bargaining. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.<sup>2</sup>

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<sup>1</sup>The name of the Employer appears as amended at the hearing.

<sup>2</sup> Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Petitioner and Employer both filed briefs which have been carefully considered.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction. The Employer is engaged in the business of providing food and facility maintenance service at HOVENSA, an oil refinery located in St. Croix, U.S.V.I. During the past twelve month period, the Employer purchased and received goods and materials valued in excess of \$50,000 directly from points located outside of St. Croix, U.S.V.I. During the same period of time, the Employer had a gross volume of business in excess of \$500,000.00.

## **I. ISSUE**

The sole issue presented is whether seven cooks employed by the Employer are supervisors within the meaning of Section 2(11) of the Act. According to the Employer, the seven cooks possess the requisite indicia of independent authority to direct employees and to make effective recommendations with respect to their terms and conditions of employment.

## **II. SUMMARY**

Having examined the entire record in this proceeding and for the reasons set forth below, I conclude that the seven cooks are not supervisors under Section 2(11) of the Act as they do not possess the requisite indicia of independent authority which would warrant their exclusion from the unit.

## **III. FACTS<sup>3</sup>**

### **A. Overview of the Employer's food service operations**

The Employer is a concessionaire of HOVENSA, an oil refinery in St. Croix, U.S. Virgin Islands, which operates two cafeterias and convenience stores, and provides catering and housekeeping services to said facility. The cafeterias are located in HOVENSA's Administrative Building and in a location known as "Port-A-Camp". The Employer's operations, including the two cafeterias herein, are under the overall responsibility of a Project Manager, two Assistant Project Managers and a Chef, whom the parties stipulated is a statutory supervisor.

The record reflects that four of the seven cooks in issue are employed in the Administrative Building cafeteria where the Employer also employs two assistant cooks, four

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- c. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
  - d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of section 9(c) (1) and section 2(6) and (7) of the Act.

kitchen helpers and one catering employee. The record reveals that the work of the Administrative Building cafeteria employees including the disputed classification is directed by Mr. Stewart (Project Manager) and his assistants.<sup>4</sup> However, it appears that the Project Manager and his assistant's contact with the cooks are minimal or sporadic. In this respect, Mr. Stewart admitted that the assistant cooks "pretty much know what [the cooks] need." Nevertheless, the evidence reflects that a cook may ask an employee to perform a specific duty related to the preparation of a particular meal or to clean kitchen utensils.<sup>5</sup>

The Chef oversees the entire operation of both cafeterias but spends a large portion of his time in the Port-a-Camp cafeteria where the remaining three cooks and four kitchen helpers are also employed. Besides performing routine duties relating to the direction of the work of these employees, the Chef is also responsible for preparation of the menu and assisting management prepare employee work schedules and job assignments.<sup>6</sup>

The cooks, as well as the other unit employees herein, are paid according to the hours that they work. Unlike Mr. Stewart and his assistants who are paid a fixed salary, the cooks and other cafeteria employees are required to register their attendance on a sign-in sheet in the Administrative Building and work according to a fixed schedule. The cooks earn about 10% less than the hourly rate paid to the Chef but 8% more than the hourly rate paid to assistant cooks. The cooks also receive the same benefits as the other employees in the unit sought herein.

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<sup>3</sup> Only one cook, Ethel Thomas, testified at the hearing. The rest of the evidence was provided by Lawrence Stewart (Project Manager), Kenneth Majors (Assistant Project Manager) and Lillia Green (dishwasher).

<sup>4</sup> The Project Manager's office has a window that overlooks the kitchen.

<sup>5</sup> Lillia Green, an Administrative Building cafeteria dishwasher, testified that anyone, including the assistant cooks, may bring to her attention something that needs to be cleaned.

<sup>6</sup> Although the Employer claims that the cooks made recommendations regarding the scheduling of employees work shift, no evidence was submitted to sustain this assertion.

## **B. Cooks' responsibilities**

As their name implies the cooks are responsible for preparing the daily meals that are served in these cafeterias. On a normal day the cooks, who are required to open and close the cafeterias, prepare meals according to a pre-established menu.<sup>7</sup> The record also reflects that while the Chef is responsible for planning and preparing the daily menu, the cooks are required to resolve any impromptu menu changes due to lack of personnel. Once the meals are prepared, the cooks assist other cafeteria employees to serve the food to its customers.

According to Mr. Stewart and his assistant, Mr. Majors, upon commencing the Employer's operations at HOVENSA, they requested several cooks to recommend other employees to work for the Employer and that some cooks referred other employees for hire. However, the record does not reflect whether any of the referred employees were actually ever considered or hired by the Employer.

The record shows that the cooks received training on safety rules and practices and that the cooks are expected to bring safety issues to the attention of the Employer.

Regarding discipline, Mr. Stewart testified that the cooks could advise management when employee misconduct occurred and recommend appropriate disciplinary action. In this respect, Mr. Stewart testified that dishwasher Wanda Lopez was disciplined after a cook reported to the Employer that Lopez always came in late to work on Mondays. However, the disciplinary warning issued to Ms. López, does not reflect whether it was prompted by the cook's report to management nor is there any evidence that the cook recommended any disciplinary action. Rather, the warning letter, which also refers to Lopez' purported alteration of her time cards, states that she was warned by her manager about the alleged conduct

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<sup>7</sup> Although the cooks do not prepare the menu, the record reflects that they have made recommendations to the Chef and management regarding its content.

Regarding employee evaluations and other supervisory indicia, Mr. Stewart testified that it was the Employer's intent, not the practice, to have cooks evaluate employees in the future. Thus, no evaluations were submitted into evidence to show a present practice of cooks preparing evaluations for other employees.

The Employer's evidence regarding the cook's authority to transfer and/or change the work schedule of employees is limited to an incident where a cook asked that management remove a kitchen helper who was not purportedly performing his work properly and therefore, was causing the cook to "work harder". Mr. Stewart testified that he acted upon the cook's recommendation and effectuated the transfer of the kitchen helper. The Employer did not submit any documentary or corroborative evidence to support that this personnel action took place or the basis for the change in work schedule.

Regarding the cooks' ostensible authority to grant or deny employees' permission to leave early or arrive late to work, the record showed that the employees are not required to inform any cooks if they arrive late or if they will leave earlier than their scheduled work time. Further, the evidence reveals that the cooks do not prepare the work schedule of the kitchen employees but rather, that this was the function of the Chef. In this regard Mr. Majors testified that if an employee had to leave work before his shift concluded, he was required to notify the Project Manager, his assistants or the Chef however, in the their absence, he could notify the cooks. Mr. Majors also testified that in emergency situations, the cooks had authority to seek replacements. On the other hand, dishwasher Lillia Green testified that if she had any work related problems including overtime, she reported such problems to management whom she identified as the Chef, Project Manager or the latter's assistants.

#### **IV. LEGAL STANDARD TO DETERMINE SUPERVISORY STATUS**

In order to determine supervisory status, the individual in question must actually possess any of the powers enumerated in Section 2(11) of the National Labor Relations Act. Section 2(11) defines the term "supervisor" as:

".... any individual having authority, in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment..."

The burden of proving supervisory status rests on the party asserting that status. Kentucky River Community Care, Inc., 121 S.Ct. 1861 (2001). Whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established. Phelps Medical Center, 295 NLRB 486, 490-91 (1989).

#### **V. ANALYSIS**

The Employer essentially relies on two arguments to show that the cooks are supervisors within Section 2(11) of the Act: a) that cooks possess the requisite indicia of independent authority to direct employees, and b) to make effective recommendations with respect to their terms and conditions of employment.<sup>8</sup>

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<sup>8</sup> In order to further support its position that cooks are supervisors within Section 2(11) of the Act, the Employer cites two Board cases, Linde Air Products Co., 77 NLRB 1206 (1948) and Potlatch Forests, Inc., 80 NLRB 613 (1948). In Linde Air Products Co., the Board found the employer's cooks to be supervisors as the evidence revealed that they could effectively recommend the hiring and discharging of the employees they supervised. As discussed further below, in the present case, the Employer failed to submit sufficient evidence to establish that the cooks effectively recommend the hiring and/or firing of employees as was the case in Linde Air Products. In Potlatch Forests, Inc., the Board found that the particular cooks to be supervisors where they were in complete charge of a kitchen and dining room, hired, supervised, directed, and scheduled the workweek of all personnel who work therein. However, the record in the present case revealed that the Employer's cooks do not have the authority to schedule the workweek of any personnel nor to hire any employees.

#### **A. Authority to direct employees**

The Employer relies heavily on the fact that management is not present the majority of the time at the locations where the kitchen personnel work and, thus, argues that in their absence the cooks are responsible for directing the work of the other kitchen employees. However, the record only reflects that the employees assigned to the Employer's cafeterias perform work that is routine in nature. The Board has held that the exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not require a finding that an employee is a supervisor within the meaning of the Act. Tree-Free Fiber, co. 328 NLRB 389 (1999); Macy's West, 327 NLRB 1222 (1999); Millard Refrigerated Services, 326 NLRB 1437 (1998); Somerset Welding & Steel, 291 NLRB 913 (1988). A task performed by an employee in accordance with the Employer's set practice does not require the exercise of independent judgment. Kentucky River, supra at 1867.

The record reveals that the cooks do not regularly give orders to the employees since they are ordinarily cognizant of their job assignments. As Mr. Stewart admitted, the assistant cooks "pretty much know what [the cooks] need." Moreover, the record reflects that the cooks at the Port-a-Camp site are supervised directly by the Chef, who the parties agreed is a statutory supervisor. In this respect the record revealed that the Chef prepares work schedules and plans the menu, tasks not performed by the cooks.

In a further attempt to prove authority to direct employees, the Employer argues that the cooks are required to enforce safety rules and practices in accordance with company policy. However, the record failed to reveal that the cooks ever carried out such responsibilities. Rather, the record revealed that all employees are required to report any irregularities to management. The Employer's argument in this respect was that the cooks received safety training and to substantiate its claim it submitted a detailed listing of their duties and responsibilities. However, the Board has held that the mere issuance of a directive to alleged

supervisors setting forth supervisory authority is not determinative of their supervisory status. Connecticut Light & Power Co., 121 NLRB 768 (1958). Furthermore, the record reflects that not all of its cooks actually took the safety training as they were not required to do so.

**B. Authority to make effective recommendations with respect to terms and conditions of employment.**

The Employer alleges that the cooks have the authority to make recommendations related to hiring, disciplining, transferring and making changes in the work schedules of employees. However, the record failed to support such arguments.

**1. Hiring**

According to the Employer, the strongest evidence of supervisory indicia was that the cooks' recommendations to hire employees were made when the Employer initiated its operations at HOVENSA. However, the Employer failed to provide any substantive evidence to support its claim. Furthermore, even if such a recommendation took place, there is no evidence that the cooks' recommendations were effectively considered during the hiring process. Thus, what the Employer alleges as a recommendation would seem more like a referral of employees for hiring. The only cook who actually testified in this regard did not provide any testimony that he had actually recommended the hiring of any employees to the Employer.

**2. Disciplining**

The record reflects that cooks do not have the authority to effectively recommend any disciplinary actions against an employee. The Employer's only evidence to suggest that a cook can recommend discipline was through the testimony of Mr. Stewart, who alleged that on one occasion a dishwasher was disciplined after a cook informed him that she was late to work every Monday. However, Stewart did not mention that the cook recommended any disciplinary action and although the Employer submitted a letter in order to corroborate that the dishwasher received a warning, the document, which makes no reference to any cook, reveals that the



employee had also altered attendance records and was previously warned by a manager about such conduct.

Mr. Thomas, a cook, testified that if an employee is not performing his job well, the cook can only inform management of the situation but cannot take any independent action against the employee. Furthermore, the evidence reflects that cooks do not often follow the procedure as the record reflects that some cooks do not even report an employee's tardiness to management.

The Employer makes an additional claim that it is anticipated that the cooks will be directly involved with the evaluations of employees. However, absent detailed, specific evidence of independent judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. Quadrex Environmental Co., 308 NLRB 101 (1992); Sears Roebuck & Co., 304 NLRB 193 (1991).

### **3. Transferring and changing work schedule of employees**

The Employer offered only one incident to prove that cooks can recommend transferring an employee from one work station to another and changes to work schedule. According to Mr. Stewart, a cook asked him to remove a kitchen helper because he was not doing his job properly and was therefore causing the cook to work harder. According to Mr. Stewart, he allegedly acted upon the cook's recommendation and changed the employee's shift hours and duties. However, this one, isolated incident does not support the Employer's contention particularly since there was no specific recommendation made regarding the changes in work location and schedule.

#### **4. Scheduling and emergencies**

The Employer further argues that the cooks: a) have the authority to grant employees permission to leave work early or to arrive late; b) are involved in preparing the employee schedules; c) seek replacements for missing employees; and d) handle minor and major emergencies. The Employer failed to prove that the cooks had the authority to perform any of these actions.

Regarding the argument that the cooks can grant an employee permission to leave work early or to arrive late, the record revealed that employees are not required to report to any cooks if they are late or if they will leave early. The cooks do not prepare the employee work schedules, a function that is performed by the Chef together with management. Mr. Majors testified that when a manager is not present, the cooks merely inform when an employee had to leave early. Nevertheless, the Board has held that authority to tell other employees to leave work early or to request, but not to require, that they stay late is routine. Panaro & Grimes, 321 NLRB 811 (1996).

Regarding the cooks' alleged involvement in preparing the employees schedules, the Employer failed to present any evidence to this respect. As mentioned previously, the record revealed that only management or the Chef prepares the work schedules.

Finally, the Employer also argues that the cook can seek replacements for missing employees. In this respect, Mr. Thomas testified that if an employee is absent, a manager, not a cook, makes the arrangements to fill the position and he does not call off-duty employees to work. However, the fact that a cook might handle an emergency situation is not indicative of supervisory status. Mount Sinai Hospital, 325 NLRB 214 (1998).

#### **IV. The Unit**

The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of section 9(b) of the Act: <sup>9</sup>

**INCLUDED:** All full-time and regular part-time employees including cooks, laundry employees, housekeeping employees, kitchen helpers, bartenders, commissary clerks, warehouse specialists, warehouse delivery, assistant cooks and catering employees employed by the Employer at its facilities in Christiansted, St. Croix, U.S.V.I.

**EXCLUDED:** All other employees, confidential employees, skilled maintenance employees, guards, and supervisors as defined by the Act.

There are approximately 39 employees in the unit.

#### **VII. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial And Service Workers International Union, AFL-CIO, CLC. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

##### **A. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date

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<sup>9</sup> With the exception of the cooks the parties had stipulated to the appropriateness of this unit.

and who retained their status as such during the eligibility period, and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

#### **B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); North Macon Health Care Facility, 315 NLRB, 359, 361 (1994); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within **7 days** of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, such list must be received in the NLRB Region 24 Regional Office, La Torre de Plaza, Suite 1002, 525 F.D. Roosevelt Ave., San Juan, Puerto Rico 00918-1002, on or before **August 12, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to

file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (787) 766-5478. Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Notices of Election**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to the Election provided by the Board in areas conspicuous to potential voters for a minimum of **three** working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least **five** full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so precludes an employer from filing objections based on the non-posting of the election notice.

### VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570. The Board in Washington must receive this request by **August 19, 2005**.

Dated at San Juan, Puerto Rico, this 5<sup>th</sup> day of August 2005.



/s/

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